

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2073

77-2078

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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IOLA FORTS, PAULA HERBERT, CYNTHIA HALL, LAURA CAREY, LINDA MAROON,
CAROL CROOKS, SHARON SILMAN, YVONNE LEE, SHEILA LILES, DEBORAH LEWIS,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

BENJAMIN WARD, individually and as Commissioner of Correctional Services,
FRANCES CLEMENT, individually and as Superintendent, Bedford Hills
Correctional Facility, DOROTHY REID, individually and as Deputy
Superintendent for Security, Bedford Hills Correctional Facility, MELVIN
H. OSTERMAN, JR., Director of Employee Relations for the State of New York,
SECURITY UNIT EMPLOYEES COUNCIL 82, AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO ("Council 82"), CARL F. GRAY, Executive
Director, Council 82, CLAYTON DeFAYETTE, President, Council 82, Local 1265
of Council 82, A.V. YARELL, President Local 1265,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES BRIEF

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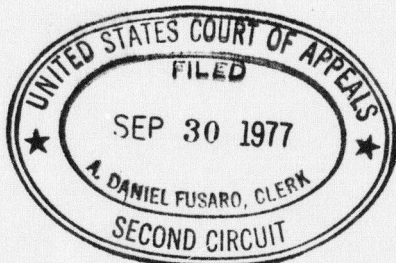


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UNITED STATES COURT OF APPEALS
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IOLA FORTS, et. al.,

Plaintiff-Appellees,

-against-

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Defendants-Appellants.

Numbers 77-2073
77-2078

APPELLEE'S BRIEF

Preliminary Statement

Plaintiffs, women inmates of Bedford Hills Correctional Facility ("Bedford Hills") brought an action pursuant to 42 USC 1983 alleging that their right of personal integrity as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments was violated when Defendants began assigning men correction officers to housing units at the prison. The District Court, Hon. Richard Owen, granted Plaintiffs motion for a preliminary injunction after making specific findings of fact and conclusions of law (114a-122a). Defendants appeal that Order.

Defendants argue that no evidentiary hearing was held as a condition precedent to granting the preliminary injunction. However, they dispute neither the principles of law argued by Plaintiffs, nor do they controvert the abuses of Plaintiffs right of personal integrity set forth in the moving affidavits. Plaintiffs having thus demonstrated a probability of success, and

irreparable injury the grant of interim relief was proper.

Issues Presented

Did the District Court properly grant a preliminary injunction upon Plaintiffs showing of a probability of success on the merits and of irreparable injury?

Statement of the Case

A. Proceedings Below:

On February 1, 1977 for the first time Defendants began assigning men to the housing units at Bedford Hills. On April 1, 1977 Plaintiffs brought this action against responsible state officials, and because job and shift assignments are controlled in part by a collective bargaining agreement, against the responsible union officials. Plaintiffs seek redress for violations of their right of personal integrity. They do not seek to remove the men from the prison. They request only that the men be assigned to those assignments and shifts where the invasions of privacy will be minimized.

Shortly after filing the complaint Plaintiffs moved for a preliminary injunction pursuant to FRCP 65 and Class Certification pursuant to FRCP 23 (14a). The motion was supported by affidavits of Bernedienne Watkins (16a) Carol Crooks (18a), Yvonne Lee (21a) and Linda Maroon (23a). Each affidavit detailed specific

instances in which men guards violated Plaintiffs right of personal integrity by observing them nude, on the toilet or in the shower. Plaintiffs also submitted a Memorandum of Law explaining their legal theories (25a-45a).

In opposition Defendants Ward, Clement and Reid ("The State Defendants") submitted the affidavit of Margery Evans Reifler, an Assistant Attorney General in the Office of the Attorney General of the State of New York (46a). That affidavit is not based on personal knowledge of the affiant. The remaining Defendants except Osterman¹ ("The Union Defendants") filed in opposition an affidavit of Carl F. Gray, Executive Director of SEU Council 82 (66a). That affidavit outlines the basic contractual provisions for assignment of correction officers in New York State.

After oral argument the District Court granted Plaintiffs motion for a preliminary injunction and denied Plaintiffs motion for Class Certification without prejudice to renewal² (124a). Defendants motion in the District Court for a stay pending appeal was denied (125a). The Union Defendants application to this Court for a stay pending appeal was denied by Judge Mulligan on July 7, 1977.

During the pendency of the motion in the District Court, and of the appeal, the parties engaged in discovery proceedings. Plaintiffs served and filed a first set of interrogatories. Defendants answered those and served interrogatories

1. Osterman had not been served with the Summons and Complaint.

2. That Order is interlocutory in nature and non-appealable.

City of New York v. International Pipe and Ceramics Co. 410 F.2d (2 Cir. 1969)

of their own. Plaintiffs then filed supplemental interrogatories.

B. The Origins of the Challenged Policy

Prior to July 23, 1976 the correction officer staff at Bedford Hills was composed solely of women. On or about that date men correction officers were assigned to various jobs and shifts at the prison (8a). On October 26, 1976 the Department issued a directive permitting correction officers to bid for all jobs pursuant to Article 25 of the Union Contract (108a).

On January 14, 1977 Defendant Clement issued a directive that men correction officers assigned to Bedford Hills were not to be assigned to Housing Units on building 112, 113, and 114. Answers to Interrogatories 4³ (precisely the relief ordered by the District Court). On February 2, 1977 she changed her mind and began permitting men to bid for jobs on the Housing Units. Answers to Interrogatories 4.

The agreement between the Union and the State of New York has provided since at least 1970 (74a) that "Job assignments and shift assignments shall be made in accordance with seniority", and that vacancies shall be posted for thirty days to allow for bidding (69a, 89a). The original 1970 contract also contained a clause prohibiting discrimination on the basis of age, sex, race, color, creed among other things (67a). However, it was not until

3. While the Answers to Interrogatories are not part of the record on appeal, this Court may take Judicial Notice subsequent proceedings in the Court below. Bryant v. Carleson 444 F2d 353 (9 Cir. 1971)

1977 that the contract was interpreted to permit assignment of guards to Housing Units where prisoners of the opposite sex live.

C. Proceedings on The Motion for Preliminary Injunction

The moving affidavits set forth a pattern and practice of violations of Plaintiffs right of personal integrity. They specify general practices of men correction officers peering at women over curtains in the rooms (17a, 18a), roaming the corridors (17a), refusing to leave a cell when a woman is on the toilet (19a), coming into shower rooms while women are drying off (19a), patrolling corridors in Housing Units with no regard whether women are undressed (19a) and peering unannounced into bathrooms in other parts of the institution (22a). The affiants set forth specific instances of privacy violations. Carol Crooks states that men guards look over the curtain that is pulled across her doorway (18a). She also states that men guards have entered the shower room and watched as she dried and dressed herself (19a). Yvonne Lee states that on several occasions C.O. Andrew Jackson looked over her curtain while she was on the toilet (21a). On March 24, 1977, at the hospital she was forced to discuss a medical problem of a personal, female nature in the presence of a male guard (22a). Linda Maroon was seated on the toilet on January 27, 1977 when C.O. Lopez looked at her. She felt embarrassed and humiliated (23a)

The State Defendants submitted no affidavits based on

personal knowledge, although because the motion, originally returnable May 9, 1977 was adjourned until June 9, 1977, there was ample time to secure an affidavit from the named Defendants. Reifler's affidavit merely alleges the existence of certain policies but nowhere denies the specific acts complained of⁴. Neither does Carl Gray, who is not employed at Bedford Hills, have personal knowledge of the actual occurrences there, and he does not rebut the facts set forth by Plaintiffs.

In their memorandum in opposition to Plaintiffs Motion neither the State Defendants (54a-65a) nor the Union Defendants (109a-125a) dispute Plaintiffs analysis of the law of the right of personal integrity. At oral argument Counsel for the State Defendants conceded the existence of the right of privacy as argued by Plaintiffs.

In his opinion Judge Owen found specific instances of impairment of Plaintiffs fundamental right of personal integrity based on the uncontroverted facts in the moving affidavits (115a-119a). He found that none of the Plaintiffs charges has been denied (116a). He concluded as a matter of law that Plaintiffs have a fundamental right of privacy whose abridgment must be supported by a compelling State interest (120a).

He then stated:

A prisoner's right of privacy must obviously be circumscribed due to needs of prison security and order.

⁴ The State acknowledges that the only allegation specifically denied was Yvonne Lees complaint that she has to discuss a personal female medical problem in the presence of a male guard (State Defendants Brief pg.11). However, the District Courts Order did not address this problem (124a).

However, these legitimate, compelling state interests are not present here. Male correction officers were assigned to the housing and hospital units at Bedford Hills in response to a conception by the prison administration and the union of the requirements of Title VII of the 1974 Civil Rights Act, as amended in 1972(sic). The structures of Title VII, however, do not mandate providing opportunity to possible "Peeping Toms." Because of a prison's need for "unceasing staff surveillance... [which] belies the feasibility of supplying wards with places of concealment," In Re Long, 127 Cal. Rpt. at 737, even the most considerate male guard cannot help but invade an inmate's privacy. (121a)

On June 22, 1977 the District Court entered its Order granting a preliminary injunction. The Order provides:

3) Pending a final determination of the action, defendants Ward, Clement, Reid and every person specified in FRCP §65 (d) are enjoined from assigning men correction officers at Bedford Hills Correctional Facility to housing units at that institution, and to remove those presently assigned. For purposes of this order "housing unit" means those portions of Building 1111, 112, 113, 114 and the hospital which contain cells or rooms in which inmates live or which contain toilets or shower facilities.

Defendants Clement and Reid shall, within ten days of the date of this order, make the necessary job and shift assignments to comply with this paragraph.

4) Pending a final determination of the action, defendants Ward, Clement and Reid, and any person specified in FRCP, §65 (d), are hereafter enjoined from permitting or requiring men correction officers who are assigned to any part of the prison,

to look in or enter shower or toilet facilities used by women inmates, except under emergency circumstances. (124a-125a)

The Order does not require removal of men correction officers from Bedford Hills or from areas in the hospital not used for living quarters. It does not require that a single correction officer be fired or transferred. It merely requires that shift assignments be made with due regard for the fundamental rights of personal integrity of the prisoners, a policy that had been enunciated by Defendant Clement on January 14, 1977 and then repealed. The injunction is therefore the least restrictive alternative to safeguard the important rights at issue.

ARGUMENT

PLAINTIFFS HAVE DEMONSTRATED A LIKLIHOOD OF SUCCESS ON THE MERITS AND HAVE SUFFERED IRREPARABLE INJURY SUFFICIENT TO WARRANT THE GRANTING OF A PRELIMINARY INUUNCTION.

It is generally acknowledged that the purpose of a preliminary 8njunction is preservation of the status quo. Nat'l Assn. of Letter Carriers v. Sombrotto, 449 F2d 915, 921 (2 Cir. 1971); Checker Motors Corp. v. Chrysler Corp., 405 F2d 319, 323 (2 Cir. 1969) cert den 394 U.S. 999 (1969). In this Circuit, a preliminary injunction will issue on a showing of "1) Probable success and possible irreparable injury or 2) Sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward Plaintiff's (emphasis in original)."

Sonesta International Hotels Corp, v. Wellington Associates
483 F2d, 250 (2 Cir. 1973), Gulf & Western Industries Inc. v.
The Great Atlantic & Pacific Tea Co. 476 F2d 687, 692-93 (2 Cir.
1973). In his opinion Judge Owen weighed the relevant factors
and found that Plaintiffs demonstrated a likelihood of success and
have suffered irreparable injury. (115a)

A. The Assignment of Men Correction Officers to Housing
Units at Bedford Hills Violates Plaintiffs Constitutionally
Protected Right of Personal Integrity

In the District Court and in opposition to the Union
Defendants application in this Court for a stay pending appeal
Plaintiffs argued that there is a right of personal integrity
rooted in the First, Fourth, Fifth, Ninth and Fourteenth Amendments.
(28a-36a). Defendants have not disputed Plaintiffs analysis,
thus implicitly conceding the existence of a right of personal
integrity which includes the right to protect their bodies from
the unwarranted exposure to men correction officers⁵.

5. Nor do Defendants dispute Plaintiffs arguments that their
conduct violates all Plaintiffs Eighth Amendment rights and the Muslim
Plaintiffs First Amendment free exercise rights. Plaintiffs also
argued below that the humiliation and degradation caused by the
probability that men will see them nude or partially clad violates
their Eighth Amendment right to be free of cruel and unusual
punishment. (36a).

In Holt v. Sarver 309 F. Supp 362 (E.D. Ark 1970) the Court
defined cruel and unusual punishment within the prison context to
be that which is "unnecessarily degrading, or that which is shocking
or disgusting to people of reasonable sensitivity..." 309 F. Supp
at 380. That standard was adopted in Frazier v. Ward 426 F. Supp
1354, 1367 (NDNY 1977).

Muslim Plaintiffs argued below that the presence of men guards
on the housing units prevents them from complying with the religious
proscription against displaying their bodies to any man outside the
first degree of consanguinity, Holy Qur'an Chap. 22 (The Light)

The right of personal integrity is a component of the right of personal privacy. Its origins as a doctrine of constitutional law were best stated by Mr. Justice Blackmun speaking for the majority in Roe v. Wade 410 U.S. 113, 152 (1973):

In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247, 22 L.Ed. 2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9, 88 S. Ct. 1868, 1872 1873, 20 L.Ed.2d 889 (1968), Katz v. United States, 389 U.S. 347, 350 88 S. Ct. 507, 510 19 L.Ed. 576 (1967); Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed. 746 (1886), see Olmstead v. United States, 277 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485, 85 S. Ct., at 1681, 1682; in the Ninth Amendment, *id.*, at 486, 85 S. Ct. at 1682 (Goldberg j., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 67 L.Ed. 1042 (1923).

Last term the Supreme Court, in two decisions, reaffirmed the Fourteenth and Fourth Amendment bases of the privacy right.

In U.S. v. Chadwick 45 USLW 4797 (U.S. June 21, 1977) Chief

5. (cont'd) Verse 31, (37a-39a). The Court thus denied a reasonable opportunity to exercise their religion without a countervailing compelling State interest in violation of the First Amendment. Monroe v. Bombard 422 F. Supp 211, 216 (SDNY 1976). Cruz v. Beto 405 U.S. 319, 322 (1972) Shelton v. Tucker 364 U.S. 479 (1960) LaReau v. MacDougall 473 F2d 974, 979 (2 Cir, 1972).

Justice Burger speaking for the majority stated:

As we have noted before, the Fourth Amendment "protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967); more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy. 45 LW at 4799.

See also Ingraham v. Wright 45 USLW 4364, 4370. (U.S. April 19, 1977). In Cary v. Population Services Int'l 45 USLW 4601, 4602 (U.S. June 9, 1977) the Court stated:

Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). This right of personal privacy includes "the interest in in independence in making certain kinds of decisions," Whalen v. Roe, --U.S.--, -- (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454; *id.*, at 460, 463, 465 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, [262 U.S. 390, 399 (1923)]." Roe v. Wade, *supra*, 410 U.S., at 152-153. See also Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974). 45 LW at 4602

The Court then held that the State must show a compelling interest before the right could be abridged.

This Court has recognized the fundamental nature of that

privacy which is essential to human dignity. Gallela v. Onasis 487 F2d 986, 995 N12 (2 Cir. 1974). In Roe v. Ingraham 480 F2d 102 (2 Cir. 1973) Judge Friendly recognized that, in so far as the right is founded in the Fourteenth Amendment concept of personal liberty it will not be confined to matters dealing with sexual intercourse and its consequences. It has been extended to prisoners in several contexts.

Prisoners have the right to private and confidential communications with their attorneys Procunier v. Martinez 416 U.S. 396 (1974). Personal searches of prisoners which include visual inspection of the anal cavity have been held, with limited exception, to constitute a violation of the Fourth Amendment right to personal integrity. Frazier v. Ward, supra, Hodges v. Klein 412 F. Supp 896 (D.N.J. 1976) see also Bonner v. Coughlin 517 F2d 1311 (7 Cir. 1975) (Stevens, J.). Loss of privacy is one factor that has contributed to holdings of unconstitutionality in "Double Celling" cases. Valvano v. Malcolm No. 70 Cir. 1390 (EDNY July 31, 1974) Sl.Op. 7. Aff'd and remanded Sub. Nom Detainees of the Brooklyn House of Detention for Men v. Malcolm 520 F2d 392, 396 (2 Cir. 1975). The dehumanizing effect of having to use toilets within sight of cellmates and other inmates is an important factor in those cases. Benjamin v. Malcolm No. 75 Civ. 3073 (SDNY November 18, 1975) Sl.Op. 5. Sandoval v. James No. C-72-2213 (N.D.Cal. October 3, 1975) Sl.Op.8

The District Court analyzed the factors contributing to the deprivation of personal integrity and relied heavily on In Re Long 127 Cal Rep 732 (Ct. App 1976) in holding that Plaintiffs constitutional rights were violated. That case was a challenge under the United States and California constitutions to the presence of female staff on living units in an adolescent institution. The California Court analyzed the foundation of the right of personal integrity under the Federal Consitution inculding the decisions in Griswold, Roe v. Wade, and York v. Story 324 F2d 450 (9 Cir. 1963) and found:

"[C]orrectional inmates are endowed with such consitutional rights as are consistent with inmate status Status as a correctional inmate entails an immediate loss of solitude. It does not necessarily destroy the other emotional stances and restraints forming the compound called privacy." In re Long, 127 Cal. Rpt. at 736-37.

The State in Long raised arguments similar to those pressed by Deffendants here. That is, the inmates could resort to certain self help measures to ensure their privacy. To that argument the Court Stated:

As a justification for female observers in the living units and in the toilet and shower areas of the gymnasium, it fails completely. In a normal social setting young men of 19 do not undress, bathe, void or excrete in the maternal presence. They are not forced to disrobe in the bathroom to escape female surveillance. Far from normalizing the environment, the presence of female observers in these areas of the institution violates the norms of privacy pre-

vailing in free society. The department has offered no justification for the violation. Id.

The problem is exacerbated when the inmates are women and the guards are men. Western society has traditionally extended women a greater right of privacy in their bodily and hygienic functions than it has to men. This societal norm is founded on deeply rooted moral and religious confictions in the Judeo-Christian, as well as Muslim teachings. Some manifestations of this tradition are that public restrooms for women are constructed to afford women more privacy than those for men; and men's locker rooms normally have common or "gang" showers while women's locker rooms normally have individual shower stalls. Similarly, men are permitted to be barechested in certain situations, e.g., while sunbathing or doing manual labor, while societal norms generally prohibit women from exposing their breasts in public.

There is a complex societal construct surrounding the viewing of women's bodies by men. The basic premise is that men often have an exploitive and voyeuristic attitude toward seeing women's nude or partially clad bodies, as witness the proliferation of "girlie" magazines and pornographic movies. Womens' reaction to these attitudes is often one of shame, embarrassment and humiliation. As a result, women who whether by accident, force or coercion, involuntarily expose their bodies to men often feel exploited, degraded and used.

This feeling stems in part from the fear of uninvited sexual assault by men. In prison the fear of sexual assault runs high. However, because biological and cultural factors make violent sexual assaults almost exclusively the male province, and because the women inmates are in a submissive position vis-a-vis the guards, this fear, real or imagined is heightened by the presence of men in living units. Recognizing these attitudes the Court in York v. Story, supra, sustaining a cause of action under 42 USC 1983 which alleged that Plaintiff, a woman, was arrested on a charge of assault and forced by the police to strip nude and be photographed nude, stated:

"We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." 324 F.2d at 455

The right of personal integrity is fundamental. It can therefore only be abridged on a showing of a compelling interest related to the security or order of the prison. Carey v. Population Services Int'l, supra, Procunier v. Martinez, supra. If there is a legitimate need for the States action, the State must employ the least restrictive alternative to accomplish its ends. Pell v. Procunier 417 U.S. 817, 826 (1974) Procunier v. Martinez, supra, 416 U.S. at 413. Standards adopted by various organizations suggest that strict limitations on the use of men in womens housing units is appropriate. Thus United Nations

Standard Minimum Rules for the Treatment of Prisoners (1975), Rule 53 (2) and (3) states:

(2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.

(3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers from carrying out their professional duties in institutions or parts of institutions set aside for women.

The National Sheriffs Association declares as a standard that "No male employee or visitor will enter the female quarters in the jail unless advance notice is given and escort service provided by a female jail supervisor. Where there are women in the jail population a female supervisor is required to be on duty." See National Sheriff's Association, A Handbook on Inmates' Legal Rights, Special Note at 3-4 (1974). Jail Standards (1977), proposed by The Nebraska State Bar Association Committee on Correctional Law and Practice, would forbid any "male facility personnel [to] enter [a] female inmate's living area, except in an emergency, without female facility personnel present." §5-(7) at 75. The cited standards enforce strong traditions, certainly familiar to a substantial portion of today's judicial personnel. And there is case law to the same effect. See Hamilton v. Love, 328, F.Supp. 1182, 1195-96 (E.D. Ark. 1971);⁶

6. The interim decree in Hamilton v. Love entered June 22, 1971 states at par. 2:

After staffing has been completed in accordance with Paragraph One above, no male employees shall be permitted in the area of the cells housing female detainees except when accompanied by female matrons when and as needed

The District Courts Order in the instant case does no more. Men are not prohibited from entering housing units under the limited circumstances specified in DOCS Directive 2230, (51a) and in the cited standards. The Court acted to prevent even inadvertent violations of Plaintiffs fundamental rights.⁷ In words apropos here, the Long Court stated:

"When undressing in the bedrooms, when bathing, urinating or defecating, the observer, partly visible or available for visibility. When the observer is a [male], an invasion of privacy occurs which is not justified by institutional needs." 127 Cal. Rept. at 737.

- B. In So Far As The Contract Between Council 82 And The State of New York Violates Plaintiffs Fundamental Constitutional Rights, It Is Unconstitutional.

It is axiomatic that a private agreement to violate a third parties constitutional rights, which depends on State action for enforcement, violates the Fourteenth Amendment Shelley v. Kraemer 334 U.S. 1 (1948). When one of the parties is an agent or employee of the State the constitutional infirmity is patent Griffin v. State of Maryland 378 U.S. 130 (1964). The Supreme Court in Adickes v. S.H. Kress & Co. 398 U.S. 144 (1970) held that to sustain a Fourteenth Amendment claim

6. (cont'd) for maintenance, cleaning assistance, and food service assistance purposes, and except in times of, and during emergencies.

7. Defendants principal argument appears to be that the injunction is too broad, and that an evidentiary hearing is necessary as to its scope. However to limit the injunction to provide incomplete protection for the fundamental rights at issue would defeat the purpose of an injunction, that of preventing irreparable harm to

Plaintiff must prove an agreement between a private individual and a Government employee to do acts which violates her rights.

The Court stated:

The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; (Citing cases) Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." United States v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1157 (1966).

Each element is satisfied here. The State and the Union entered into an agreement governing the assignment of correction officers. For six years the Department and the Union interpreted the seniority and non-discrimination clauses of the contract to respect the personal integrity of the prisoners. Then at the urging of the Union the practices complained of were instituted by the State (Brief for Union Defendants p. 8). This drastic shift resulted in violation of fundamental rights of persons not party to the agreement. In this context the Union Defendants

7. (cont'd) Plaintiffs. The action is proceeding rapidly to trial. Even during the pendency of this appeal the parties are engaged in discovery. If the preliminary injunction provided less protection for Plaintiffs right of personal integrity, and after a preliminary trial the Court found that prohibiting assignment of men from housing units was the only way that Plaintiffs rights

reliance on International Brotherhood of Teamsters v. U.S. 45 USLW 4506 (U.S. May 31, 1977) is misplaced. There the seniority clause discriminated against certain members of the Union. The rights of third parties were not involved as they were in Shelley, Adickes, Griffin and here.

Moreover, while a qualified person has the right to be a correction officer he or she does not have the unqualified right to work at a particular assignment or in a particular prison. The October 26, 1976 memorandum (108a), and Directive 2230 (51a) which establish guidelines for the assignment of co correction officers are evidence that establishment of policy and criteria for employment of correction officers rests with the Commissioner. Within the prison it is indisputable that the Superintendent exercises that responsibility. (See Answers to Interrogatories 4 wherein Defendant Clement established policy for assignment of men correction officers).

The sex of the officer can be a legitimate criteria for a job assignment. In Dothard v. Ranlinson 45 USLW 4888, (U.S. June 27, 1977) aff'g Meith v. Dothard 418 F. Supp. 1169 (M.D. Ala 1976). The Court upheld the exclusion of women from employment at Alabama's maximum security mens prisons. Mr. Justice Marshall in dissent felt that the less drastic alternative of selective work responsibilities would

7. (cont'd) could be protected, then Plaintiffs will have been irreparably injured in spite of the injunction (See post p)
Conversely, if after a plenary trial the injunction is found to be too broad, it can easily be modified without the danger of permitting violations of the right of personal integrity.

safeguard the rights of prisoners and staff. He suggested that "it may well be possible, once constitutionally adequate staff is available, to rearrange work assignments so that legitimate inmate privacy concerns are respected without denying jobs to women." 45 USLW at 4894 n. 5. See also Reynolds v. Wise 375 F. Supp 145, 151 (N.D. Tex 1974).

The District Court applied that alternative. Judge Owen balanced the competing rights of men to work at Bedford Hills and the inmates right to personal integrity. He directed that Defendants rearrange work assignments to respect the womens legitimate privacy concerns while permitting men to work at jobs in the prison.

C. The Violation of Plaintiffs Fundamental Rights Constitutes Irreparable Injury

Violation by the State of fundamental constitutional rights is irreparable injury per.se, requiring no further showing of harm. 414 Theater Corp. v. Murphy 499 F2d 1155, 1159 (2 Cir 1974). In the prison context those violations are often continuing. In Sostre v. Rockefeller 309 F. Supp 611 (SDNY 1969) the court held that each day spent in solitary confinement under unconstitutional conditions was irretrievably lost, and the harm suffered was irreparable. More recently the District Court has held that continuing daily deprivation of constitutional rights as to conditions of custody is irreparable by definition. Benjamin v. Malcolm No. 75 Civ 3073 (SDNY July 11, 1975) sl.op.6.

Defendants concede the existence of plaintiffs right to personal integrity. Because of the nature of the prison

environment the policy of assigning men guards to housing units at Bedford Hills cannot, as Judge Owen said "help but invade an inmates privacy" (121 a). The violations of the fundamental right are continuing and the humiliation of unwanted exposure of their bodies to their men keepers is irreparable.

D. The District Court Properly Granted A Preliminary Injunction After Oral Argument

As noted earlier the function of a preliminary injunction is preservation of the status quo. (ante p8.) The lower courts order is a temporary measure against a change in a long standing policy until there can be final determination on the merits. As such it merely preserves the status quo as it existed for six years prior to the assignment of men correction officers to housing units at Bedford Hills, and was a proper exercise of discretion. 414 Theater Corp. v. Murphy, supra 499 F 2d at 1162.

That discretion will not ordinarily be disturbed on appeal unless it has been abused or unless there is a clear mistake of law Triebwasser & Katz v. AT & T 535 F2d 1356, 1358 (2 Cir 1976) 414 Theater Corp. v. Murphy, supra, Exxon Corp. v. City of New York 480 F2d 460, 464 (2 Cir 1973). Defendants failure to dispute plaintiffs analysis of the law of privacy can only mean that the lower court did not commit a mistake of law. Nor did the District Judge abuse his discretion in granting a preliminary injunction on affidavits and oral argument where 1) the existence of the fundamental constitutional right is acknowledged by all parties 2) defendants policy of assigning men correction officers to housing units is admitted and 3) specific

charges of invasions of privacy are un rebutted. ⁸

In SEC v. Frank 388 F2d 486 (2 Cir 1968) Judge Friendly discussed two circumstances in which a preliminary injunction may be granted on affidavits:

In many instances there is no serious dispute about the facts; the issues, perhaps very troublesome ones, concern the meaning and applicability of a statute or common law rule. The taking of evidence would serve little purpose in such cases; argument is what the judge requires. In another group there is little dispute as to the raw facts but much as to the inferences to be drawn from them, as well, perhaps, as to the meaning and applicability of the governing statute or common law rule. Although an evidentiary hearing would be of more value in such cases and should be held whenever practicable, it will sometimes be apparent that the magnitude of the inquiry would preclude any meaningful 'trial-type' hearing within twenty days. 388 F2d at 490-491

Plaintiffs have demonstrated that they come within the first category. cf. Herbert Rosenthal Jewelry Corp. v. Grossbandt 428 F2d 551 (2 Cir 1970). However, in the second category a preliminary injunction will preserve the status quo pending a plenary trial. Trial of the propriety of defendants policy and its implications will require inmate testimony, expert witnesses, and presumably, Correction officials and union officials. Thus even if there are disputes about the factual inferences to be drawn from the challenged policy the "magnitude of the inquiry" would preclude a full trial type hearing on plaintiffs motion, and necessitates a preliminary injunction based on affidavits and oral argument to preserve the status quo.

8. The suggestion by defendants that plaintiffs can resort to "self help" measures is an implicit admission that their right of personal integrity is violated by defendants policy.

This Court, and District Courts in this circuit, do grant preliminary injunctions based on affidavits. In Herbert Rosenthal Jewelry Corp. v. Grossbardt, supra, a copyright infringement action, the basic acts were admitted by defendants. This Court held that the raising of factual issues by defendant sufficient to defeat a motion for summary judgment did not preclude the grant of a preliminary injunction in favor of plaintiff. The situation in U.S. ex. rel Wolfish v. Levi 406 F. Supp 1243 (S.D.N.Y. 1976) was similar to the case at bar. There the District Court granted a preliminary injunction based on affidavits in a prison case where, as here, the change in defendants policy which created a constitutional violation was admitted, and specific allegations of hardship in prisoner affidavits were un rebutted except in the most general way by defendants.

The cases cited by defendants for the proposition that a hearing is necessary are within Judge Friendly's third category and are inapposite. They are either securities cases, SEC v. Frank, supra SEC v. Petrofunds, Inc., 414 F. Supp 1191 (SDNY 1976) Dopp v. Franklin National Bank 461 F2d 873 (2 Cir 1973) involving complex questions of knowledge, intent and fraud, or cases involving complex commercial transactions Semmes Motors Inc. v. Ford Motor Co. 429 F2d 1197 (2 Cir 1970) Cerruti, Inc. v. McCrory Corp. 438 F2d 281 (2 Cir 1971). In those cases, it is difficult if not impossible to unravel the facts and an evidentiary hearing is necessary before a preliminary injunction issues. They are far different from the present

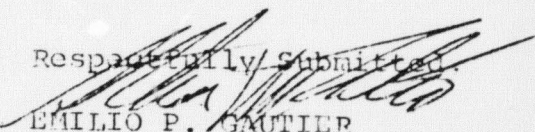
case where the defendants have admitted the policy, have not denied action taken in furtherance of that policy, or the consequences of that action, and there is no dispute as to the applicable law. In this case the grant of a preliminary injunction was a proper exercise of discretion.

CONCLUSION

Plaintiffs have established that defendants have violated their fundamental constitutional right to personal integrity by assignment of men correction officers to the housing units of the prison. The Defendants have offered no compelling justification for these violations. Nor could they. The change in practice, made with the complicity of the union, is not justified by considerations of security because past history shows that women correction officers are fully capable of maintaining security and order.

The District Courts order maintains the status quo as it existed for many years prior to the change in policy, while permitting men correction officers legitimate opportunity for assignment to Bedford Hills. The order accomplished this end while safeguarding the fundamental rights of plaintiffs pending a final determination of the action. Because there was no real dispute as to the facts or law, the Court properly acted on the basis of the affidavits and oral argument. The grant of a preliminary injunction should therefore be affirmed.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

This is to certify that on September 30, 1977 two copies each of the within Appellees Brief were served by mail on the attorneys for Appellants as follows:

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